



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDV/153551

PRELIMINARY RECITALS

Pursuant to a petition filed November 15, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Fond Du Lac County Department of Social Services in regard to Medical Assistance, a hearing was held on December 23, 2013, at Fond Du Lac, Wisconsin.

The issue for determination is whether the Department erred in its determination of the divestment period.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Deb Bohlman

Fond Du Lac County Department of Social Services
87 Vincent Street
Fond Du Lac, WI 54935-4595

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Fond Du Lac County.
2. Petitioner gave away cash of \$12,500 to her three children as Christmas gifts in December 2012. The total gift was \$37,500.

3. Petitioner applied for institutional MA on July 16, 2013. She requested that coverage begin on August 1, 2013.
4. On August 16, 2013 the Department issued a Positive Notice indicating that MA was approved for the period beginning July 1, 2013 and ending September 2013.
5. The Department Issued a Negative Notice August 16, 2013 indicating that July, August and September 2013 were actually months of ineligibility for long term care MA due to a divestment to petitioner's children. Card service eligibility remained during this period. The Notice indicated eligibility would begin October 1, 2013.
6. Another Positive Notice was issued on October 3, 2013. This one indicated Long Term Care MA approval beginning on December 2, 2013 and ending June 2014.
7. Another Negative Notice was issued on October 3, 2013 indicating no eligibility for October and November due to the change of the divestment penalty period. The notice conceded that the initial determination of the divestment period was done incorrectly by the agency.
8. Petitioner appealed

DISCUSSION

A divestment occurs when an institutionalized individual, his spouse, or another person acting on his behalf, transfers assets for less than fair market value, on or after the individual's "look-back date." Wis. Stat. § 49.453(2)(a). "Fair market value" is an estimate of the prevailing price an asset would have had if it had been sold on the open market at the time it was transferred. Medicaid Eligibility Handbook (MEH) § 17.2.1. The "look-back date" is defined as 36 months before, or with respect to trusts, 60 months before, the first date the individual is both institutionalized and an MA applicant. MEH § 17.3.

If such a transfer occurs, the individual is ineligible for MA for nursing home services for a number of months determined by totaling the value of all assets transferred during the look-back period and dividing that amount by the average monthly cost to a private patient of nursing facility services at the time of the MA application. MEH § 17.5. The ineligibility period begins with the month of the first divesting transfer of assets.

A parallel divestment definition is found at Wis. Admin. Code § HFS 103.065(4), and states in the parts relevant here, as follows:

(4) DIVESTMENT. (a) *Divestment resulting in ineligibility.* An institutionalized individual or someone acting on behalf of that individual who disposes of resources at less than fair market value within 30 months . . . immediately before or at any time after the date the individual applies for MA while institutionalized, shall be determined to have divested. . . (Emphasis added).

A divestment is not a bar to MA eligibility where:

(d) *Circumstances under which divestment is not a barrier to eligibility.* An institutionalized individual who has been determined to have made a prohibited divestment under this section shall be found ineligible for MA as defined under s. DHS 101.03 (95) unless:

1. The transfer of property occurred as the result of a division of resources as part of a divorce or separation action, the loss of a resource due to foreclosure or the repossession of a resource due to failure to meet payments; or

2. It is shown to the satisfaction of the department that one of the following occurred:
 - a. The individual intended to dispose of the resource either at fair market value or for other valuable consideration;
 - b. The resource was transferred exclusively for some purpose other than to become eligible for MA;
 - c. The ownership of the divested property was returned to the individual who originally disposed of it; or
 - d. The denial or termination of eligibility would work an undue hardship. In this subparagraph, “undue hardship” means that a serious impairment to the institutionalized individual’s immediate health status exists.

Wis. Adm. Code § DHS 103.065(4)(d) (emphasis added).

In a Fair Hearing such as this, the petitioner has the burden of proof to establish that a denial action taken by the county, such as the denial of MA due to a divestment of assets was improper given the facts of the case. See 20 C.F.R. §§416.200-416.202; see also, 42 C.F.R. §435.721(d). The burden of proof is on the applicant or recipient to show that one of the above circumstances exists.

In this case, the core question is whether the \$37,500 cash gifts made by petitioner on December 10, 2012 was correctly determined to be a divestment, and whether the penalty period was ultimately determined correctly.

The gift to petitioner’s children was made seven months prior to the LTC MA application. This is within the look-back period. The cash was simply given away as a gift to bring “joy” to petitioner. This is clearly a transfer of assets for less than market value. Petitioner’s daughter in law first argued that the various notices were confusing. I agree. But, the fact that there have been errors in the case do not matter. The question for me to determine is whether the \$37,500 was a divestment and what the penalty period was correctly determined (as the final determination applied to petitioner) to be from the application date until December 1 with eligibility commencing December 2, 2013. It is unfortunate that the agency initially made an error, and that petitioner’s daughter in law was inconvenienced by this. But, I have no authority to simply grant her money as compensation for the confusion and inconvenience as she suggests I do.

The MA program is a public benefit for needy individuals. Petitioner gave away nearly \$40,000 to her family and then applied for public benefits to pay for her long term care which could have otherwise been paid for by the money given away to her children. Petitioner’s daughter in law argues that she would like to keep the money. This would amount to the MA program funding Christmas gifts to the petitioner’s children which is exactly what the divestment rules prohibit.

In this case, the daily rate to determine the divestment period is \$243.49. The amount of the \$37,500 gifts divided by this amount results in a 154 day penalty. The Department correctly determined this to mean that eligibility was to begin on December 2.

CONCLUSIONS OF LAW

The Department did not err in its determination of the divestment period.

THEREFORE, it is

ORDERED

That this appeal is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

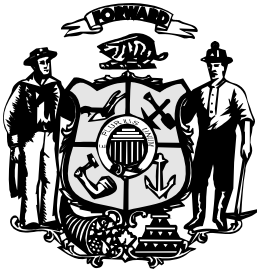
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 21st day of January, 2014

\sJohn P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 21, 2014.

Fond Du Lac County Department of Social Services
Division of Health Care Access and Accountability